89-1015

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

RICHARD G. THOMAS,
Petitioner,

v.

STATE OF OHIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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RICHARD G. THOMAS,
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QUESTIONS PRESENTED

I. Whether the failure to suppress evidence seized during a warrantless search of Petitioner's automobile initiated upon information obtained from an admitted unlawful wire interception by a private person, in violation of Ohio's Wiretap Statute, R.C. Secs. 2933.51, et seq., deprived Petitioner of the requirement that the State conform to its own procedure rules as a generally recognized constitutional protection under the due process clause of the Fourteenth Amendment to the United States Constitution.

II. Whether the good faith exception to the exclusionary rule is inapplicable where a probation officer, although in good faith, acts outside the scope of his authority by himself imposing an unlawful condition on the accused, who was not on probation, and

makes an arrest and search incident thereto for violation of the unlawful condition.

III. Whether in a hearing on a motion to suppress evidence for lack of probable cause, the state bears the burden of proof, including the burden of going forward with the evidence, on the issue of whether probable cause exists for a warrantless search and seizure.

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Appendix B. The Decision and Entry of the Court of Common Pleas, Washington County. Ohio, dated February 16, 1988, Case No. 86 CR 12 is unreported and is set forth in Appendix C.

JURISDICTION

The Decision of the Supreme Court of Ohio overruling Petitioner's motion for leave to appeal and claimed appeal as of right entered on October 25, 1989, was a determination by the highest state court in which a decision could be had. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3), Petitioner claiming rights under the Fourteenth Amendment to the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION: FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or

immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ARTICLE VI

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance Thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

OHIO REVISED CODE SECTION SECTION 2925.11(A)(C)(1) [Drug Abuse.]

(A) No person shall knowingly obtain, possess, or use a controlled substance.

(C) Whoever violates this section is guilty of drug

abuse.

(1) If the drug involved is a compound, mixture, preparation, or substance included in schedule I or II, with the exception of marijuana, drug abuse is a felony of the fourth degree, and if the offender has previously been convicted of a drug abuse offense, drug abuse is a felony of the third degree.

SECTION 2951.05 [Control and Supervision of Defendant on Probation.]

If the defendant mentioned in section 2951.02 of the Revised Code resides in the county wherein the trial is had, an order for probation shall place the defendant under the control and supervision of the county department of probation. If there is no such department, it may under Section 2301.32 of the Revised Code place him on probation in charge of the adult parole authority created by Section 5149.02 of the Revised Code acting through its parole supervision section, which shall then have the powers and duties of a county department of probation. If the defendant resides in a county other than that wherein the court granting probation is situated and a county department of probation has been established in the county of residence, such order of probation may request the court of common pleas of the county wherein the defendant resides to receive him into the control and supervision of such county department of probation, subject to the jurisdiction of the trial judge over and with respect to the person of the defendant, and to the rules and regulations governing such department of probation. If the county of defendant's residence has no department of probation, the judge may place him on probation in charge of the adult parole authority created by

Section 5149.02 of the Revised Code.

SECTIONS 2933.51-66 [Ohio's Wiretap Statute]

The pertinent Sections of Ohio's Wiretap Statute are set forth in Appendix D.

SECTION 2951.041 [Treatment in Lieu of Conviction.]

This statute is set forth in Appendix D.

UNITED STATES CODE

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 211-2251, 18 U.S.C. Secs. 2510-2520.

[Federal Wire and Oral Interception Statute.]

The pertinent sections of the Federal Wiretap Statute are set forth in Appendix D.

STATEMENT OF THE CASE

The constitutional question of a denial of due process under the Fourteenth Amendment to the United States Constitution was specifically raised by the Petitioner in his motion to suppress evidence filed with the trial court. The same constitutional question was raised in the Court of Appeals and the Ohio Supreme Court in Petitioner's briefs, assignments of error and argument. (Court of Appeals opinion, p. A-3).

On November 16, 1985, a warrant to search the home of Petitioner, Richard G. Thomas, was obtained by the Marietta, Ohio Police Department. The warrant was requested pursuant to an affidavit submitted to Judge Walter C. Hallock by Patrolman R. L. Meek. The affidavit contained information furnished by Patrolman T.M. Hickey and an undisclosed "reliable informant."

Pursuant to the warrant, officers searched the Petitioner's home and confiscated from a safe approximately three (3) grams of cocaine. On January 15, 1986, Petitioner was indicted and charged with, among other things, drug abuse, a fourth degree felony under O.R.C. Sec. 2925.11 (A)(C)(1).

Thereafter, Petitioner entered into a plea agreement with the State whereby Petitioner pled guilty to the drug abuse charge, which plea was held in abeyance by the court. The Petitioner requested treatment in lieu of conviction pursuant to O.R.C. Sec. 2951.04, The trial court granted Petitioner's request and the plea remained in abeyance. Petitioner was ordered to a three (3) year period of rehabilitation.

In addition to the rehabilitation treatment required of Petitioner by O.R.C. Sec. 2951.041, the trial court required Petitioner "to obey the general terms and conditions of persons on probation as journalized in Volume 99, Page 184 of the records of [the] court", although

Petitioner was not on probation. Two conditions of the treatment were that Petitioner was to follow his probation officer's written instructions and that Petitioner was prohibited from possessing, among other things, any hallucinogen except on prescription of a licensed physician.

On July 17, 1987, during Petitioner's period of rehabilitation, Petitioner and Kristi Offerman ("Offerman") engaged in a telephone conversation. Petitioner was using a telephone at his home and Offerman was using a telephone at her home. At the same time, Phillip Huff (hereinafter "Huff"), who was also under parole supervision by Petitioner's probation officer, was present in Offerman's home. Without the knowledge or consent of either Offerman or Petitioner, Huff eavesdropped on the telephone conversation between Petitioner and Offerman. This was accomplished by surreptitious use of an extension telephone in violation of O.R.C. Section 2933.52, a provision of Ohio's Wiretap Statute, as held by both the trial court and the court of appeals.

After the telephone conversation between Petitioner and Offerman, Huff contacted Petitioner's probation officer to disclose the contents of the conversation. Huff told the probation officer that while eavesdropping on the conversation, he heard Petitioner and Offerman plan a meeting at a grocery store located in Marietta, Ohio. Pursuant to this information, the probation officer proceeded to the place where Petitioner and Offerman were to meet. After reaching the grocery store, the probation officer observed Offerman enter Petitioner's car. Petitioner then drove his car from the parking lot. The probation officer followed and eventually forced the Petitioner to stop his car.

The probation officer ordered Petitioner out of his car and placed him under arrest for violating the condition which prohibited Petitioner from associating with Offerman. This condition was imposed by Petitioner's probation officer pursuant to written instruction. After

handcuffing Petitioner and placing him under arrest, the probation officer searched Petitioner's car incident to the arrest. During his search of the car, the probation officer found a small bag containing approximately four (4) grams of marijuana.

On July 20, 1987, the State of Ohio (hereinafter "State") filed a motion and complaint charging Petitioner with violating two conditions of his treatment in lieu of conviction. One charge alleged that Petitioner violated his probation officer's special written instruction which prohibited him from associating with Kristi Offerman. The second charge alleged that Petitioner violated the condition which prohibited him from, among other things, possessing marijuana.

At a hearing on October 9, 1987, the trial court found probable cause to believe that Petitioner violated both conditions as charged in the State's motion and complaint.

On December 31, 1987, the Petitioner filed a motion to suppress all evidence of the alleged violations seized by the probation officer on July 17, 1987. The primary basis for Petitioner's motion to suppress was that all evidence of the alleged violations was derived solely from the surreptitious use of an extension telephone in violation of O.R.C. Sec. 2933.52, Ohio's Wiretap Statute. Therefore, that evidence should have been suppressed pursuant to O.R.C. 2933.62(A), the exclusionary provision of the Wiretap Statute.

Petitioner further argued that the restriction prohibiting him from contacting Offerman was invalid, and, therefore, there was not probable cause for the stop and arrest. Without probable cause, any evidence from the ensuing search should have been suppressed. At the hearing on Petitioner's motion to suppress, the prosecutor was called upon to present the State's case to show probable cause for the warrantless arrest and search. The

prosecutor declined to present any evidence.

On February 16, 1988, the trial court filed its decision denying Petitioner's motion to suppress. However, in the same decision, the trial court found that the probation officer's order prohibiting Petitioner from associating with Offerman was invalid. Such a condition could be imposed only by the court (Appendix p. A-26).

A final hearing was scheduled for February 19, 1988, to determine if the Petitioner violated the condition which prohibited him from possessing marijuana. At that hearing, counsel for both parties stipulated that certain testimony from the probable cause hearing and a BCI analysis report would be the only evidence considered by the trial court at the final hearing. On February 25, 1988, counsel for Petitioner filed a transcript of the stipulated testimony.

On April 20, 1988, the trial court filed a written decision finding that Petitioner had violated the condition which prohibited him from possessing marijuana. On June 21, 1988, the trial court, pursuant to O.R.C. Sec. 2951.041, entered an adjudication of guilt and ordered a pre-sentence investigation.

On July 25, 1988, the trial court sentenced Petitioner to a definite period of one (1) year in the Correctional Reception Center at Orient, Ohio. That sentence was suspended upon the following conditions: 1) that Petitioner be placed on probation for a period of five (5) years; 2) that Petitioner obey the general terms and conditions of probation; 3) that Petitioner submit to a substance abuse evaluation to determine if treatment is necessary; 4) that Petitioner comply with any further treatment deemed necessary by the probation officer; 5) that Petitioner submit to drug testing; and 6) that Petitioner serve six (6) months in the Washington County Jail and after thirty (30) days may do work release if it is available.

On August 15, 1988, the Petitioner appealed to the Fourth District Court of Appeals for the State of Ohio from, among other things, the trial court's decision denying Petitioner's motion to suppress.

In a 2 to 1 decision, the court of appeals affirmed the judgment of the trial court (Appendix p. A-20). In his dissenting opinion, Judge Grey would have reversed the trial court's decision which denied Petitioner's motion to suppress (Appendix p. A-22).

On August 25, 1989, the Petitioner filed a motion for leave to appeal in the Ohio Supreme Court. The Petitioner contended that the court of appeal's judgment, which affirmed the trial court's holding denying Petitioner's motion to suppress, deprived Petitioner of his rights to due process and equal protection of the laws under the Fourteenth Amendment of the United States Constitution.

On October 25, 1989, the Ohio Supreme Court filed an entry, without an opinion, overruling Petitioner's motion for leave to appeal (Appendix p. A-1.). Because the Petitioner has been deprived of his constitutional rights under the Fourteenth Amendment, this petition for a writ of certiorari is being filed with the United States Supreme Court.

REASONS FOR GRANTING THE WRIT

I.

Certiorari should be granted by virtue of the due process clause of the Fourteenth Amendment to the United States Constitution, where the trial court, court of appeals and Ohio Supreme Court fail to follow a mandatory state statute requiring suppression from a trial or hearing the contents, or evidence derived from the contents, of an unlawful wire interception.

On December 31, 1987, Petitioner filed a motion to sup-

press certain evidence from the final hearing scheduled to determine if Petitioner violated the conditions of his treatment in lieu of conviction. The evidence sought to be suppressed was the marijuana seized from Petitioner's car. The Petitioner's motion argued that suppression was warranted based upon O.R.C. Secs. 2933.51-.66 (1987) (Appendix p. A-31).

O.R.C. Sec. 2933.52(A) prohibits, among other things, the surreptitious interception of an oral or wire communication. Sec. 2933.52(A)(3) further prohibits disclosure of "the contents, *or any evidence derived from the contents,* of any wire... communication" if that evidence was obtained in "violation of Sections 2933.51 to 2933.66 of the Revised Code" (Appendix p. A-34-35). A violation of Section 2933.52 is a felony of the third degree. Section 2933.52(C).

Moreover, Sec. 2933.62(A) provides a specific and unequivocal exclusionary rule prohibiting the admissibility of the contents, or any evidence derived from the contents, of an unlawfully intercepted wire communication (Appendix p. A-37). Sec. 2933.63(A) provides that an "aggrieved person in any... hearing may request the court by motion to suppress the contents, or any evidence derived from the contents," of an unlawfully intercepted communication (Appendix p. A-37-38). There appears to be no Ohio case involving an interpretation of this statute.

The Ohio statute pertaining to oral and wire interception was patterned after Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 211-2251, 18 U.S.C. Secs. 2510-2520. 18 U.S.C. Secs. 2510-2520 have pre-empted the field of intercepted oral and wire communications. However, federal law does not preclude a state from applying more restrictive rules to wire interception situations. *United States v. Smith,* 726 F.2d 852 (1st Cir. 1984). See also *United States v. McKinnon,* 721 F.2d 19 (1st Cir. 1983). The federal law has been inter-

preted to have two separate purposes. First, it serves the purpose to implement the constitutional exclusionary rule. Second, it protects an individual's right to privacy. *United States v. Vest,* 813 F.2d 477 (1st Cir. 1987).

The prohibitions found in 18 U.S.C. Secs. 2510-20 have been construed to apply to surreptitious wire interception by use of an extension telephone. In *Campiti v. Walonis,* 611 F.2d. 387 (1st Cir. 1979), the court was unable to "divine any reason for an extension telephone exception." The statute's purpose is to prohibit the surreptitious monitoring of wire communications. The statute's application should not turn on the type of equipment that is used. Id. at 392.

Accordingly, applying the law of *Smith, McKinnon* and *Campiti,* the surreptitious use of an extension telephone to intercept a wire communication is prohibited by O.R.C. Secs. 2933.51-66. A construction of the Ohio statute which exempted from its proscriptions the use of an extension telephone would be less restrictive than the federal statute, and, therefore, invalid under the Supremacy Clause of Article VI to the United States Constitution. *United States v. Smith, supra,* at 20.

In the present case, the court of appeals, in adopting the rationale in *Campiti,* held that the Ohio statute applies in situations where the instrumentality used to intercept the communication is an extension telephone (Appendix p. A-8).

The next issue before the court of appeals was whether the statutory scheme applies to an unlawful interception by a private person as well as government officials. In the present case, Petitioner's probation officer testified in the probable cause hearing and in the motion hearing that an extension telephone was used by Huff to intercept a conversation between Petitioner and Offerman. There was also testimony that the interception was accomplished without the knowledge or consent of either party to the

conversation.

O.R.C. Sec. 2933.52(A) provides that *no person* purposely shall surreptitiously intercept a wire communication. Thus, the Ohio statute on its face prohibits eavesdroping on an extension telephone by private persons. Moreover, the legislative history of the federal statute indicates that Congress contemplated the statute as outlawing the surreptitious use of an extension telephone by a private person. *Briggs v. American Air Filter Co., Inc.*, 630 F.2d 414, 418 (5th Cir. 1980).

The court of appeals, in finding no ambiguity in the language of the Ohio statute, held that:

> [I]t covers everybody. If the General Assembly had wanted the statute to be limited to state officials, it could have so drafted it. Further, the federal statute applies to private persons as well as public officials. See *United States v. Vest* (1987), 813 F.2d 477; *United States v. Underhill* (1987), 813 F.2d 105.
>
> Finally, there is no reason for the statute not to apply to private persons as well as state officials. Anyone who surreptitiously intercepts a wire or oral communication should be held accountable for his actions. Therefore, Brian Huff violated R.C. 2933.52 when he listened to the conversation between [Petitioner] and Offerman by using the extension telephone in Offerman's apartment and thereby is subject to the criminal and civil penalties provided for in R.C. 2933.52 and 2933.65.

(Appendix p. A-8).

The court of appeals further held that the marijuana seized by Petitioner's probation officer was evidence

gathered as a direct result of the violation of the Wiretap Statute (Appendix p. A-9). Thus, the *only* issue remaining was whether that evidence should be suppressed under O.R.C. Sec. 2933.62. That provision renders inadmissible in a hearing the contents, *and evidence derived* from the contents, of an unlawfully intercepted wire communication.

Notwithstanding the Ohio statute's clear and unequivocal language, the court of appeals refused to apply the statutory exclusionary provision to suppress the marijuana confiscated by Petitioner's probation officer. The majority held that because the violation of the Wiretap Statute was by a private person with no state involvement, the constitutional exclusionary rule was inapplicable. The majority also held that Petitioner's independent right to privacy under the Wiretap Statute is limited to disclosure of the contents of an unlawful interception. Accordingly, because Petitioner sought to suppress the marijuana and not the contents of his conversation with Offerman, there was no further invasion of privacy by not suppressing the evidence discovered as fruits of the unlawful wiretap (Appendix p. A-11).

Because the majority opinion limits the statutory exclusionary rule to the contents of an unlawful interception, the "evidence derived from" language is given no effect. That holding is contrary to the express language of the state and federal statutes. Congress and the Ohio legislature expressly extended an aggrieved person's right to privacy to evidence derived from the contents of an unlawful interception. Plainly, the "derivative evidence" rule was contemplated when the federal and state statutes were enacted.

In *State v. Pierson,* 248 N.W.2d 48 (Sup. Ct. South Dakota 1977), the defendants moved to suppress narcotics seized from their motel room. The defendants contended that the narcotics were evidence derived solely

from the contents of an unlawful interception in violation of 18 U.S.C. Secs.2510-2520. The trial court held that a violation occurred when the motel manager used an extension phone to eavesdrop on two telephone conversations between one defendant and a third party. The trial court further held that the narcotics confiscated by the police were derivative of the information obtained by the motel manager's unlawful interception and that such evidence was inadmissible under the wiretap exclusionary rule. *Pierson,* 248 N.W.2d at 50.

On appeal, the South Dakota Supreme Court reversed the trial court's decision. The upper court found that while a violation of the Federal Wiretap Statute had occurred, the evidence seized by the police was not obtained by exploitation of the primary illegality. The officers were led to the drugs because a motel maid had discovered them while cleaning the defendants' room. The upper court found that those facts were sufficiently independent of the unlawful interception by the motel manager. Pierson, 248 N.W.2d at 52, 53.

In *Pierson,* although the Fourth Amendment exclusionary rule was inapplicable for want of state action, the upper court, in determining the applicability of the statutory exclusionary rule, applied the general law of search and seizure set forth by the United States Supreme Court. *See Nardone v. United States,* 308 U.S. 338 (1939) (evidence derived from exploitation of the primary taint is barred from use by the prosecution unless it falls into one of the exceptions developed to limit the reach of the derivative evidence rule); *Wong Sun v. United States,* 371 U.S. 471 (1963) (applying the attenuation rule exception to admit derivative or secondary evidence).

In *Pierson,* the South Dakota Supreme Court gleaned from the legislative history of the Federal Wiretap Statute that Congress intended that the general law of

search and seizure be applied in cases involving the federal wiretap exclusionary provision. *Pierson,* 248 N.W.2d at 52, 53. At pages 2184-85 of 1968 U.S. CODE CONG. & AD. NEWS, Congress stated that:

> Section 2515 of the new chapter imposes an evidentiary sanction to compel compliance with the other prohibitions of the chapter. It provides that intercepted wire or oral communications or *evidence derived therefrom* may not be received in evidence in any proceeding before any court... where the disclosure of that information would be in violation of this chapter... there is, however, no intention to change the attenuation rule... Nor generally to press the scope of the suppression role beyond present search and seizure law... But it does apply across the board in both Federal and State proceeding[s]... Such a suppression rule is necessary and proper to protect privacy... The provision thus forms an integral part of the system of limitations designed to protect privacy. Along with the criminal and civil remedies, it should serve to guarantee that the standards of the new chapter will sharply curtail the unlawful interception of wire and oral communications. (emphasis added) (citations omitted).

The upper court in *Pierson* found that Congress clearly contemplated cases involving motions to suppress derivative evidence under the statutory exclusionary provision. Plainly, Congress found a right to privacy not only in the contents of an unlawful interception, but also in evidence derived from the contents of that interception. At least two federal cases, although involving illegal wiretaps by government officials, have held that the appropriate inquiry under the federal wiretap exclusionary provision is whether the evidence sought is the fruit of an illegal

wiretap; the type of evidence involved is irrelevant. *In re Proceedings to Enforce Grand Jury Subpoenas,* 403 F. Supp. 1071 (E.D. Pa. 1977); *Resha v. United States,* 767 F.2d 285 (6th Cir. 1985).

In *United States v. Vest,* 813 F.2d 477 (1st Cir. 1987), the defendant, under 18 U.S.C. Sec. 2515, moved to suppress a tape recording that was made by a private person in violation of the Federal Wiretap Statute. 18 U.S.C. Sec. 2511(1)(a) and 2(d). The district court granted the defendant's motion to suppress.

On appeal the government argued that the statutory exclusionary provision of Section 2515 was not applicable "where the government is merely the innocent recipient, rather than the procurer, of an illegally - intercepted communication." *Vest,* 813 F.2d at 480.

In affirming the lower court decision granting suppression, the First Circuit held that:

> We agree with the district court that to hold that section 2515 allows the government's use of unlawfully intercepted communication where the government was not the procurer "would eviscerate the *statutory protection* of privacy from intrusion by illegal private interception." 639 F. Supp. at 914-15. The protection of privacy from invasion by illegal private interception as well as unauthorized governmental interception plainly "plays a central role in the statutory scheme," *see United States v. Giordano,* 416 U.S. 505, 528 (1974).
> *Vest,* 813 F.2d at 481 (emphasis added).

In the present case, the majority opinion of the court of appeals found that the marijuana was obtained "as a direct result of the violation" of the Wiretap Statute (Appendix p. A-9). However, the majority held that only the contents of an unlawful interception were subject to sup-

pression. The court in *Pierson, supra,* clearly recognized that the drugs found in defendants' motel room were subject to suppression absent an exception to the derivative evidence rule found in the exclusionary provision of the wiretap statute. The *Pierson* court recognized that Congress intended courts to apply the general law of search and seizure to wiretap cases, even where the illegality involves a private person and not government authorities. In the present case, the court of appeals held that even if evidence is gathered by exploitation of a primary illegality, the Wiretap Statute does not require suppression. That holding is contrary to express congressional intent and the express language in the state and federal statutes.

In the instant case, a strong dissenting opinion was written by Judge Grey for the court of appeals. Judge Grey wrote that:

> The evidence derived from the contents of this intercept by Huff, was used by Spencer, the probation officer, to arrest [Petitioner]. As far as I am concerned there is no ambiguity in what the statute means. There is no ambiguity in the facts in this case - an intercepted communication was used as evidence in this case. This unquestionably is illegal and inadmissible.
>
> In this case "evidence derived from the contents of an intercepted wire communication" was used in a court proceeding. This is a violation of R.C. 2933.62(A). *What happened here is just exactly what the legislature wanted to prevent.* If we will not enforce the laws guaranteeing our right to privacy, we will not have a right to privacy. (emphasis added).

(Appendix pp. A-21,22).

Both the trial court and the court of appeals disregarded the express language of the exclusionary provision of the Federal and Ohio Wiretap Statutes. Because the court of appeals erred in holding that the wiretap exclusionary provision was inapplicable in the present case, and because the Ohio Supreme Court denied Petitioner's motion for leave to appeal, the Petitioner has been deprived of his right to due process and equal protection of the laws under the Fourteenth Amendment to the United States Constitution.

It is basic to the rights of the defendant in a criminal case that once the state undertakes to deprive an individual of life or liberty it must conform to the rules of procedure which it has itself established. *State v. Cocco,* 73 Ohio App. 183 (1943). The requirement that the state conform to its own procedure rules is a generally recognized constitutional protection under the due process clause of the Fourteenth Amendment to the United States Constitution.

II.

Certiorari should be granted because the holdings below have improperly extended the good faith exception of the Fourth Amendment exclusionary rule to cases where a probation officer makes an arrest and search incident thereto for violation of a void condition that the officer imposed upon the accused.

In his motion to suppress at the trial court level, the Petitioner argued that his probation officer was without authority to impose the condition which prohibited him from associating with Offerman. Therefore, the probation officer lacked probable cause to make an arrest for a violation of that condition, and the fruits of that illegal arrest should have been suppressed from the final hearing. The trial court held that the probation officer was without authority to impose the non-association condi-

tion. The trial court found that O.R.C. Section 2951.05 which concerns the control and supervision of a probationer, delegates no authority to a probation officer to impose such a condition. Accordingly, the trial court dismissed that part of the State's complaint which charged Petitioner with a violation of the non-association condition (Appendix p. A-26).

However, the court denied Petitioner's motion to suppress the marijuana which was seized incident to the arrest. Although the court held that the non-association condition was invalid, it found that the probation officer had probable cause to believe that Petitioner had violated a condition of probation. Therefore, the probation officer had authority to arrest Petitioner and search his car incident to that arrest (Appendix p. A-29).

In affirming the trial court, the court of appeals found the facts in the present case analogous to the facts in *Michigan v. Defillippo,* 443 U.S.31, 40 (1979). In *Defillippo,* this Court upheld an arrest and search made pursuant to a criminal ordinance, where the ordinance was subsequently declared unconstitutional. This Court based its decision on the officer's good faith reliance upon the constitutionality of the statute. To exclude the evidence under the Fourth Amendment would not further the purpose of the exclusionary rule to deter illegal police conduct.

In the present case, the court of appeals held that Petitioner's probation officer acted in good faith when imposing the invalid non-association condition. Therefore, under *Defillippo,* the good faith exception to the exclusionary rule precluded suppression of the marijuana seized by the probation officer (Appendix p. A-14).

The obvious distinction between *Defillippo* and the present case is that in the latter, Petitioner's probation officer was relying on an invalid rule which he imposed. The probation officer was not relying on a legislative

enactment or a warrant issued by a neutral and detached magistrate. *See United States v. Leon,* 468 U.S. 897 (1984) (when an officer acts in objective good faith reliance on a warrant, issued by a detached and neutral magistrate, that is subsequently determined to be invalid, the exclusionary rule is inapplicable).

In *Illinois v. Krull,* 480 U.S. 340 (1987), the Supreme Court again considered whether the good faith exception to the exclusionary rule applies when an officer's reliance on the constitutionality of a statute is objectively reasonable, but the statute is subsequently declared unconstitutional. Another issue not before the Court, but argued by the defendants in the lower courts, was whether an exception to the exclusionary rule applies where an officer who erroneously, but in good faith, believes he is acting within the scope of a statute. However, in its dictum the Supreme Court stated that:

> At this juncture, we decline the state's invitation to recognize an exception for an officer who erroneously, but in good faith, believes he is acting within the scope of a statute. Not only would such a ruling be premature, but it does not follow inexorably from today's decision. As our opinion makes clear, th question whether the exclusionary rule is applicable in a particular context depends significantly upon the actors who are making the relevant decision that the rule is designed to influence. The answer to this question *might well be different* when police officers act out outside the scope of a statue, albeit in good faith. In that context, the relevant actors are not legislators or magistrates, but police officers who concededly are engaged in the often competitive enterprise of ferreting out crime.

Krull, 480 U.S. at 361, n.17. (emphasis added).

In the present case, the trial court found that O.R.C. Sec. 2951 05, which concerns control and supervision of a probationer, delegated no authority to Petitioner's probation officer to impose the non-association condition (Appendix p. A-26). Even assuming that the probation officer, in good faith, believed he was acting within the scope of the statute, the Supreme Court in *Krull* clearly indicated that, under those circumstances, the good faith exception to the exclusionary rule is inapplicable. This is particularly true in the instant case since the probation officer usurped the function and jurisdiction of the common pleas court.

The rationale for not applying the good faith exception to the present case is clear. The good faith exception requires an objective reasonable reliance on a warrant or statute. Where officers act outside the scope of a statute, as in the present case, the actors are not legislators or magistrates. Each case would turn on the subjective good faith of individual officers. That is exactly what the Supreme Court wanted to avoid when it adopted the good faith exception to the exclusionary rule. *United States v. Leon, supra,* at 919, n.20.

The Supreme Court never intended to extend the good faith exception to cases where an officer acts outside the scope of a statute in making an arrest and search incident thereto. To deny Petitioner's motion to suppress under these circumstances would promote rather than deter unlawful police conduct. The officer would be encouraged to impose conditions or make arrests regardless of their validity or his authority. He would know that evidence obtained from a search incident to an unlawful arrest would be admissible. Such a rule is totally unreasonable and violates Petitioner's right to be free from an unreasonable search and seizure under the Fourth Amendment as incorporated into the due process clause of the Fourteenth Amendment to the United States Con-

stitution.

III.

Certiorari should be granted because the courts below improperly placed the burden of proving lack of probable cause for a warrantless search and seizure upon the Petitioner. Requiring Petitioner, at the motion hearing, to go forward with the evidence and bear the ultimate burden of persuasion deprives him of due process of law under the Fourteenth Amendment to the United States Constitution.

At the hearing on Petitioner's motion to suppress, which was conducted on January 8, 1988, the State offered no evidence concerning the validity of the probation officer's warrantless search. The prosecutor, after being called upon to present his evidence, stated that he had no evidence to present. After expressly stating that he would not waive the requirement that the State bears the burden of proof to establish probable cause for a warrantless search and seizure, defense counsel presented Petitioner's case.

In *Xenia v. Wallace*, 37 Ohio St. 3d 216, 524 N.E.2d 886 (1988), the Ohio Supreme Court held that:

> [O]nce a defendant has demonstrated a warrantless search or seizure and adequately clarified that the ground upon which he challenges its legality is lack of probable cause, the prosecutor bears the burden of proof, including the burden of going forward with evidence, on the issue of whether probable cause existed for the search or seizure.

Wallace, 37 Ohio St. 3d at 220. This rule flows from the presumption that warrantless searches are *per se* unreasonable under the Fourth Amendment. *Wallace*, 37 Ohio St. 3d at 218. *See Coolidge v. New Hampshire*, 403

U.S. 443, 454-455 (1971); *Katz v. United States,* 389 U.S. 347, 357 (1967). "The overwhelming majority of state and federal courts are in agreement on this point". *Wallace,* 37 Ohio St. 3d at 218, n.2.

In the present case, the evidence was uncontroverted that it was a warrantless search. Moreover, Petitioner's motion to suppress was supported by a memorandum containing three separate grounds for suppression, all based upon the probation officer's lack of probable cause for the warrantless arrest and search.

Accordingly, under the law of *Wallace,* the burden of going forward with the evidence and the ultimate burden of persuasion to show the validity of the search was on the State.

In his brief to the court of appeals, the Petitioner raised the issue of which party has the burden of proof in a hearing to determine whether probable cause existed for the warrantless search. The court of appeals failed to decide this issue.

Because the prosecutor filed to produce any evidence at the suppression hearing, Petitioner's motion should have been granted. The trial court's failure to suppress violated Petitioner's right to due process of law under the Fourteenth Amendment to the United States Constitution.

CONCLUSION

Three important questions are respectfully submitted to the Supreme Court in this Petition, all of which involve the law of arrest, search and seizure. Firstly, the Ohio and Federal Wiretap Statutes each contain a specific exclusionary provision for the contents, and any evidence derived from the contents, of an unlawful interception. Each statute applies to an unlawful interception by a private person as well as government authorities. The

legislative history of the federal statute reveals that Congress clearly intended to create a specific right to privacy from the illegal interception of an oral or wire communication.

Secondly, this Court never intended for the good faith exception to the exclusionary rule to be applied where a police officer, although subjectively in good faith, acts outside the scope of his authority in making an unlawful arrest and subsequent search. In the present case, the probation officer was not relying on a legislative enactment or a warrant issued by a neutral and detached magistrate. The probation officer was acting on an unlawful condition of probation which *he* imposed on Petitioner.

Finally, this Court has held that warrantless searches are *per se* unreasonable under the Fourth Amendment, subject to a few specific recognized exceptions. Accordingly, the overwhelming majority of state and federal courts have placed the burden of going forward with the evidence and ultimate burden of persuasion on the state in a motion to suppress hearing. In the present case, the state failed to present any evidence on Petitioner's motion to suppress.

Respectfully submitted,

William J. Abraham
24 North High Street
Columbus, Ohio 43215
Counsel for Petitioner

CERTIFICATE OF SERVICE

The undersigned, William J. Abraham, hereby certifies that he is a member in good standing of the bar of the United States Supreme Court; that he has served the below named party with a true copy of the within Petition for writ of Certiorari, Appearance of Counsel and Notarized Statement of Mailing, by depositing the same in a United States Mail Box of the United States Post Office, with first-class postage prepaid, addressed to counsel of record at the post office address recited below on the 22nd day of December, 1989.

William J. Abraham
Counsel For Petitioner

Service to:
Michael G. Spahr
Prosecuting Attorney
Washington County, Ohio
205 Putnam Street
Marietta, Ohio 45750
(614) 373-7624
Counsel of Record
for Respondent

Appendix A

The Supreme Court of Ohio

State of Ohio, Appellee, v. Richard George Thomas, Appellant.	:	1989 TERM To wit: October 25, 1989 Case No. 89-1495 ENTRY

Upon consideration of the motion for leave to appeal from the Court of Appeals for Washington County, and the claimed appeal as of right from said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $20.00, paid by William J. Abraham.

(Court of Appeals Nos. 88CA22 and 88CA29)

THOMAS J. MOYER
Chief Justice

Appendix B

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

State of Ohio Plaintiff-Appellee	:	Case No. 88 CA ,22 & 29
vs.		
Richard George Thomas Defendant-Appellant	:	**DECISION AND JUDGMENT ENTRY**

APPEARANCES:

Mr. William J. Abraham, Columbus, Ohio and Mr. Rick J. Abraham,
Columbus, Ohio, for Appellant.

Mr. Michael G. Spahr, Washington County Prosecuting Attorney,
Marietta, Ohio, for Appellee.[1]

Stephenson, J.

This is an appeal by Richard George Thomas, defendant below and appellant herein, from a judgment entered by the Washington County Court of Common Pleas which vacated a prior order which had, following a guilty plea to a drug abuse offense, ordered treatment in lieu of conviction pursuant to R.C. 2951.041. The court's judgment, pursuant to R.C. 2951.041(F) was a result of appellant's purported violations of the conditions of his rehabilitation. Appellant assigns the following error:

[1] Appellee filed no brief in this appeal.

ASSIGNMENT OF ERROR NO. I:

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT-APPELLANT'S MOTION TO SUPPRESS CERTAIN EVIDENCE FROM THE HEARING CONDUCTED TO DETERMINE IF DEFENDANT-APPELLANT VIOLATED CONDITIONS IMPOSED PURSUANT TO TREATMENT IN LIEU OF CONVICTION.

ASSIGNMENT OF ERROR NO. II:

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT-APPELLANT'S MOTION TO WITHDRAW HIS PLEA OF GUILTY TO THE OFFENSE OF DRUG ABUSE.

ASSIGNMENT OF ERROR NO. III:

THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED IN TERMINATING APPELLANT'S TREATMENT IN LIEU OF CONVICTION AND ENTERING AN ADJUDICATION OF GUILT FOR VIOLATION OF A CONDITION WHICH WOULD OTHERWISE CONSTITUTE A MINOR MISDEMEANOR.

ASSIGNMENT OF ERROR NO. IV:

THE TRIAL COURT ERRED IN DENYING APPELLANT CREDIT FOR TIME SERVED AS AN IN-CARE PATIENT IN MARIETTA MEMORIAL HOSPITAL.

On November 16, 1985, the Marietta Police Department obtained a warrant to search the home of appellant

for drugs. The warrant was based upon an affidavit containing information from a "reliable source". During the search, the police found, inter alia, approximately three grams of cocaine in appellant's safe. On January 15, 1986, appellant was indicted on four drug counts, including a charge of drug abuse in violation of R.C. 2925.11(A)(C).

On November 7, 1986, appellant pleaded guilty to the drug abuse charge after requesting treatment in lieu of conviction pursuant to R.C. 2951.041. The court stayed the criminal proceedings, granted appellant's request for treatment, and ordered appellant to follow a three year period of rehabilitation. The court further required appellant to obey the general terms and conditions of probation as though he were a probationer. Two conditions of the probation were that appellant was to follow the probation officer's written instructions and that appellant was prohibited from possessing, inter alia, any hallucinogen except on prescription of a licensed physician.

One written instruction of the probation officer was that appellant was to refrain from having any contact with Kristi Offerman, appellant's ex-girlfriend, or Phillip Huff, Offerman's present boyfriend, who was then on parole. This restriction came at the request Offerman. Offerman later changed her mind and requested that the restriction be lifted. The probation officer refused to remove the restriction because he felt that Offerman was playing appellant and Huff "for chumps" by vacillating between the two men whenever it was economically advantageous.

On July 17, 1987, appellant and Offerman were engaged in a telephone conversation. Unbeknownst to either of them, Huff was listening to the conversation on an extension in Offerman's apartment where he was living at the time. After the conversation was over, Huff called the probation officer and told him that appellant

and Offerman were planning on meeting. Acting on this tip, the probation officer went to look for appellant. He spotted appellant's car pulling into a parking lot and saw Offerman enter the car.

The probation officer followed appellant's car and eventually flashed his lights and blinkers to get appellant to stop. The probation officer ordered appellant out of the car and informed him that he was under arrest for violating a condition of his parole by associating with Kristi Offerman. As appellant got out of the car, the probation officer noticed an odor which he knew to be from marijuana, a hallucinogen. He proceeded to search the car and found four grams of marijuana under a floor mat in the back seat. Appellant was charged with violating two conditions of his treatment in lieu of conviction.

On December 31, 1987, appellant filed a motion to suppress all evidence of the July 17, 1987 violations. Appellant asserted that since Huff surreptitiously listened to the conversation between appellant and Offerman in violation of R.C. 2933.52, any evidence derived from information supplied by Huff ought to be suppressed pursuant to R.C. 2933.63. Appellant further argued that the restriction prohibiting appellant from contacting Offerman was invalid, and, therefore, there was no probable cause for the stop and arrest. If there was no probable cause for the stop and arrest, concluded appellant, any evidence from the ensuing search should be suppressed.

The court found that the restriction prohibiting appellant from contacting Offerman was invalid because the probation officer had no authority to impose such a condition which could be imposed only by the court. The court dismissed the violation concerning the restriction, but refused to suppress the evidence. The court felt that since the probation officer believed he had probable cause to make the initial stop and arrest, the subsequent uncovering of the marijuana was not invalid. As to the possible

violation of R.C. 2933.52, the court held that there was indeed a violation by Huff, but found that the exclusion provision in R.C. 2933.62 was inapplicable but articulated no reason for such inapplicability.

Appellant moved to withdraw his plea of guilty on February 25, 1988. He attached three affidavits, including one affidavit of Brian Miller, who claimed to have planted the cocaine in appellant's safe. The court overruled this motion stating that appellant failed to meet his burden of proof and that it did "nct find the 'newly discovered evidence' [the affidavits] to be either properly established or compelling."

On July 21. 1988, the court entered an adjudication of guilt and ordered a presentence investigation. On July 25, 1988 appellant was given a one year suspended sentence at the Correctional Reception Center in Orient, Ohio; given a six month sentence in the Washington County Jail with work release after one month if available; place on probation for five years; ordered to submit to a substance abuse evaluation to determine if treatment is necessary; ordered to comply with any further treatment deemed necessary by the probation officer; and ordered to submit to drug testing.

Appellant's first assignment of error asserts that the trial court erred in failing to suppress certain evidence from the hearing conducted to determine whether appellant violated any conditions imposed pursuant to his treatment in lieu of conviction. Appellant essentially argues that R.C. 2933.51-66 mandate that the court suppress all evidence derived solely from the surreptitious use of an extension telephone by a private person, and, further, that an invalid arrest by a parole officer renders any ensuing search of an automobile invalid and, thus, rendering any evidence derived therefrom inadmissible.

R.C. 2933.52(A)(1) prohibits the interception of wire or oral communications. R.C. 2933.52(A)(3) prohibits the

disclosure of "the contents, or any evidence derived from the contents, of any wire or oral communication" if obtained in violation of R.C. 2933.51-66. There are a number of exceptions to the general rule, the most important of which, set out in R.C. 2933.53-59, establishes the procedure for obtaining or using an interception warrant. None of the exceptions are applicable in the present case. If there is a violation of R.C. 2933.52, the R.C. 2933.62 provides an exlusionary rule for evidence derived in violation of 2933.52, and R.C. 2933.63 sets forth the procedure to follow to have the evidence suppressed.

There are two issues presented as to whether R.C. 2933.51-66 is even applicable in the case sub judice: i.e. (1) whether the statutory scheme applies in situations where the instrumentality used to intercept the communication is an extension telephone, and (2) whether the statutory scheme applies to private individuals. R.C. 2933(1)(D) defines "interception device" as "any electronic, mechanical, or other device or apparatus that can be used to intercept a wire or oral communication." That definition appears broad enough to include extension telephones. There are no relevant Ohio cases; however, the Ohio statute is very similar to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520. In fact, the Ohio statute must provide no less protection to individuals than does the federal statute. We assume, for our analysis, that both statutes provide identical protections.

In construing the federal statute, the First Circuit court of Appeals stated that there was no "reason for a 'telephone extension' exception... [the statute's] application should not turn on the type of equipment that is used, but on whether the privacy of telephone conversations has been invaded in a manner offensive to the words and intent of the Act." *Campiti v. Walonis* (1979), 611 F.2d 387, 392. The court below adopted this inter-

pretation and this court does as well.

Appellant and Offerman were engaged in a private telephone conversation discussing a possible meeting between the two of them. This is a situation that Huff did not want to occur; therefore, Offerman and appellant would not want Huff to be privy to their discussion. Consequently, Huff's use of the extension phone, without the consent of either party, constituted a violation of R.C. 2933.52 if the statute applies to private persons.

In his contention that the statute should apply to private persons as well as state officials, appellant looks to Florida which has a very similar law. Appellant cites *State v. Horn* (App. 1974, 298 So. 2d 194, where the appellate court held, in reversing the lower court which had held that the statute only applies to state officials, that the clear language of the Florida statute proscribes surreptitious interceptions by private citizens, supra at 201. Since there is no legislative history as to the purpose of the Ohio statute, we find the Florida court's analysis to be beneficial here. R.C. 2933.52 begins, "*[n]o person* purposely shall..." (emphasis added) There is no ambiguity about the language; it covers everybody. If the General Assembly had wanted the statute to be limited to state officials, it could have so drafted it. Further, the federal statute applies to private persons as well as public officials. See *United States v. Vest* (1987), 813 F 2d 477; *United states v. Underhill* (1987), 813 F. 2d 105.

Finally, there is no reason for the statute not to apply to private persons as well as state officials. Anyone who surreptitiously intercepts a wire or oral communication should be held accountable for his actions. Therefore, Brian Huff violated R.C. 2933.52 when he listened to the conversation between appellant and Offerman by using the extension telephone in Offerman's apartment and thereby is subject to the criminal and civil penalties provided for in R.C. 293352 AND 2933.65.

Because R.C. 2933.52 was violated, the crux of the analysis is whether R.C. 2933.62 can be used to keep the evidence gathered as a direct result of the violation from being used in the case sub judice. This section is very similar to the federal law. See 18 U.S.C. 2515.[2] The language appears to be all encompassing. The federal law has been interpreted to have two separate purposes. First, it serves the purpose to implement the constitutional exclusionary rule. Second, it protects individual's right to privacy. See *Vest*, supra at 481.

One of the primary purposes of the constitutional exclusionary rule has been the deterrence of future unlawful police conduct. *Elkins v. United States* (1960), 364

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[2] R.C. 2933.62 reads, in pertinent part, as follows:

"(A) No part of the contents, and no evidence derived from the contents, of any intercepted wire or oral communication shall be received in evidence in any trial, hearing, or other proceedings in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of this state or of a political subdivision of this state, if the disclosure of that information is in violation of sections 2933.51 to 2933.66 of the Revised Code."

Similarly, 18 U.S.C. 2515 states the following:

"Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter [18 USCS Sec. 2510 et seq.]."

U.S. 206; *Terry v. Ohio* (1968), 292 U.S. 2. In recent years deterrence has become the major purpose "if not sole one." *United States v. Janis* (1976), 428 U.S. 433, 446. For a good analysis of the background and purpose of the exclusionary rule, see 1 Lafave, Search and Seizure (1987), 1-20 Section 1.1.

If evidence is uncovered through the illegal actions of a state official, the excluding that evidence from trial will deter similar conduct in the future by the state official. If, however, the illegal conduct was by a private person, then there would be no deterrence factor in excluding the evidence because no state official had done anything which needed to be deterred, i.e., the government was an innocent recipient of the information. In the present case, as discussed supra, there was a violation of the wiretap law, but that violation was by a private person, there was no state involvement. There is no reason under the constitutional exclusionary rule to exclude the evidence of the subsequent search by the parole officer for the actions of Huff.

Appellant cites a number of cases in support of his contention that the marijuana should be excluded. In *In re Proceedings to Enforce Grand Jury Subpoenas* (1977), 403 F. Supp. 1071, evidence was excluded; however, in a passage quoted by appellant, the court stated that the purpose of the exclusionary rule "is to deter privacy-invading misconduct by denying *officials* the fruits of *their* misconduct" (emphasis added). The present case is distinguishable because there was no misconduct by the parole officer. The other cases cited by appellant are inapposite as well because they all involve misconduct by government officials. In *Smith v. State* (1983), 438 So. 2d 10, federal agents initiated air and ground surveillance after they obtained information from an illegal wiretap. Likewise, in *Bagley v. State* (1981), 397 So. 2d 1036, police officers searched the home of Bagley pursuant to a

warrant based upon an affidavit containing information from a wire communication which the police themselves had unlawfully intercepted.

Even though there was no violation of the constitutional exclusionary rule, there is still the question of an invasion of appellant's right to privacy. Whenever there is a violation of the wiretap law, a person who unknowingly had his conversation intercepted suffers from an invasion of privacy. The invasion of privacy is not a one time occurrence. Every time the contents of the illegally intercepted conversation are disclosed, the person will suffer a further invasion of privacy. Therefore, the federal wiretap law, and, we assume, the Ohio statute, prohibits further disclosure of the contents regardless of whether the illegal interception was made by a state official or private individual.

In the case at bar, however, there was no further invasion of privacy by the court's failure to suppress. What appellant sought to suppress was not he contents of the conversation between himself and Offerman, but instead the marijuana which the parole officer found in appellant's car. Once the parole officer spotted Offerman getting into appellant's car, the contents of the illegally intercepted conversation became irrelevant except as to how the officer initially became aware of the meeting. Because there was no further invasion of privacy by admitting the marijuana into evidence, that purpose of the wiretap law would be satisfied.

We are still faced with what appears to be all encompassing language in the statute. There are no explicit exceptions within have been formulated. See *United States v. Winter* (1981), 663 F. 2d 1120 (contents may be disclosed for purpose of impeachment); *United States v. Libby* (1973), 354 F. Supp. 217 (contents may be disclosed in prosecution of person who made the illegal interception). We, therefore, believe that where both purposes of

the wiretap law have been satisfied — i.e. implementation of the constitutional exclusionary rule and protection of the right to privacy — evidence discovered as fruits of an illegal wiretap need not be suppressed.

Appellant further asserts that since the condition prohibiting him from contacting Kristi Offerman was invalid, there was no probable cause for the arrest and, therefore, the ensuing search was invalid. Because the search was invalid, so the argument goes, the evidence derived therefrom should have been excluded from the hearing determining whether there were violations of the conditions for treatment in lieu of conviction.

Simply put, the issue is whether there was probable cause for the stop and arrest. If there was probable cause, then the marijuana was admissible as evidence found pursuant to a search incident to a lawful arrest. On July 17, 1987, when the parole officer stopped appellant, he believed that the condition prohibiting appellant from contacting Offerman was valid. Acting in good faith, the parole officer arrested appellant for violating the condition.

This is analogous to the situation where a police officer, acting upon a statute, arrests a person for violating that statute, and during the search incident to the arrest the officer uncovers evidence of another crime. Then, after the arrest, the statute the suspect violated is found to be unconstitutional. The United States Supreme Court held the following in such a case involving a Detroit ordinance:

> "The subsequently determined invalidity of the Detroit ordinance on vagueness grounds does not undermine the validity of the arrest made for violation of that ordinance, and the evidence discovered in the search of respondent should not have been suppressed."

Michigan v. Defillippo, (1979), 443 U.S. 31, 40. The reasoning for this is that at the time of the arrest, the policy officer did have probable cause to arrest the respondent. Probable cause for an arrest means "facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." *Defillippo,* supra at 37. It does not matter that subsequently the suspect is acquitted on the charge for which he was originally arrested. As long as there was probable cause for the arrest, the search is valid.

In the case at bar, the probation officer was acting upon a condition which he had imposed. Until July 16, 1987, the day before appellant was arrested for meeting with Offerman, all parties were abiding by the condition without complaint. In fact, it was not until August 10, 1987, three and one-half weeks after the arrest, that any party took any legal action to have the condition removed. The parole officer had no reason to believe that the condition was invalid and unenforcable. Appellant attempts to show that the probation officer knew, or should have known that the condition was invalid by asserting that it was an inappropriate condition. If the condition was inappropriate, that might be a factor in showing that there was no probable cause. However, contrary to appellant's belief, the condition was not inappropriate. In fact, the lower court so stated in the "Decision on Motion to Suppress" when it held as follows:

> "This court does not believe that the instruction directing the Defendant to stay away from Offerman and Huff was inappropriate. Considering the history of the parties, it appears that such an instruction was as necessary to controlling an 'as though he

were on probation' Defendant, as it would have been for a Defendant who was actually on probation. Defendant did not complain to the court about the instruction. The court does not find it to be unduly restrictive of Defendant's liberty or incompatible with his freedom of conscience, under the circumstances."

Appellant further argues that not suppressing the evidence will lead to probation officers imposing conditions, regardless of their validity, in order to arrest a probationer to make a search, because even if condition is determined to be invalid, any evidence uncovered during the search will be admissible. This court does not believe that to be the case. Before the arrest is valid, there must be probable cause. In order for there to be probable cause, the person making the arrest must be acting in good faith. If the probation officer knows the condition he imposed is invalid, he is acting in bad faith and there is no probable cause. Likewise, if the condition imposed is inappropriate and unlawful, and a prudent person would know that it was inappropriate and unlawful, again there would be no good faith and, therefore, no probable cause.

In the case sub judice, there is nothing in the record which would lead to the conclusion that the probation officer acted in bad faith. Further, because of the situation involving Huff, Offerman, and appellant, the condition was appropriate. Therefore, even though the condition was invalidated because the probation officer did not have the authority to impose such a condition, the probation officer had probable cause to believe that appellant was violating a condition of treatment in lieu of conviction. Hence, the lower court did not err in overruling the motion to suppress. For the aforementioned reasons, appellant's first assignment of error is overruled.

Appellant's second assignment of error asserts that the

trial court erred in denying appellant's motion to withdraw his plea of guilty to the offense of drug abuse pursuant to Crim. R. 32.1 which provides the following:

> "A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."

A motion to withdraw a guilty plea "is addressed to the sound discretion of the trial court, and the good faith credibility and weight of the movant's assertions in support of the motion are matters to be resolved by that court." *State v. Smith* (1977), 49 Ohio St. 2d 261, 264. See also *State v. Frohner* (1948), 150 Ohio State 53. Prior to sentencing, withdrawal motions ought to be granted; however, as Crim. r. 32.1 states, after sentencing, the movant must show that "manifest injustice" would occur unless the guilty plea is withdrawn. The term "manifest injustice" has been "variously defined, but it is clear that under such a standard, a post sentence withdrawal is allowable only in extraordinary circumstances." *Smith,* supra at 64.

Without articulating why it so concluded, the court below stated that in this case the appellant "has the burden of proving something less than 'manifest injustice', but certainly more than just he doesn't like the way things are going." While this court does not agree with the lower court's standard, given the specificity of the manifest injustice standard in the rule, assuming arguendo that the aforementioned standard is correct, appellant's assignment of error is still without merit.

Because allowance of a post-sentence withdrawal motion is discretionary, an appellate court will only

reverse the decision if there was an "abuse of discretion" by the trial court. "The term 'abuse of discretion' connotes more than an error of law or judgment, it implies that the court's attitude is unreasonable, arbitrary, or unconscionable." *State v. Apanovich* (1987), 33 Ohio St. 3d 19, 22; *State v. Adams* (1980), 62 Ohio St. 2d 151.

Appellant relies heavily on the affidavits of three persons in his assertion that the withdrawal motion should have been granted. One of the affidavits was that of Brian Miller, the person who appellant believed to be the "reliable source" in the affidavit for the search warrant which led to the original indictment against appellant. In his affidavit, Miller states that he planted the cocaine in appellant's safe. The other two affidavits, those of Tina and Mike Rose, state that Miller told them that he planted the cocaine in appellant's safe.

Appellant asserts that these affidavits show his innocence, and therefore, he should have been permitted to withdraw his guilty plea. He claims that the lower court refused to consider the affidavits because they were objected to by the State on hearsay grounds. While that is essentially true, the court did state that the affidavits would not add much to the case even if they were admissible. There was no corroborating evidence to show that the spot where Miller said he placed the cocaine was the actual spot where the cocaine was found by the police. There was also no attempt by the appellant to introduce testimony of other persons named in the affidavit which could help verify the affidavit of Miller.

The court below weighed the material before it and did not believe it constituted "something less than manifest injustice" so as to warrant granting appellant's motion. Clearly, there was no "abuse of discretion" by the lower court because there was nothing "unreasonable, arbitrary, or unconscionable" about the court's decision. therefore, this court will not reverse the original deter-

mination in this matter. Accordingly, appellant's second assignment of error is overruled.

Appellant's third assignment of error asserts that the trial court abused its discretion and erred in terminating appellant's treatment in lieu of conviction and in entering an adjudication of guilt for violating a condition of his treatment. The code section which controls termination of treatment is R.C. 2951.041(F) which states, in pertinent part, as follows:

> "If the treating facility or program reports that the offender has failed treatment, or if the offender does not satisfactorily complete the period of rehabilitation or the other conditions ordered by the court, the court may take such actions as it considers appropriate. Upon violation of the conditions of the period of rehabilitation, the court may enter an adjudication of guilt and proceed as otherwise provided."

There are no specific guidelines as to when a court should enter an adjudication of guilt and when it should allow the violator to remain in treatment. Therefore, it is a discretionary function of the court. The test for whether there was an "abuse of discretion" is discussed supra.

Appellant places much emphasis on the fact that the violation for which he was charged would in other circumstance be only a misdemeanor. He also argues that the purpose of R.C. 2951.041 is rehabilitation and that the statute contemplates a possible relapse by a person in treatment. Appellant concludes that to revoke treatment after a single relapse defeats the purpose of the statute, and, therefore, the trial court abused its discretion in so acting.

The uncontroverted facts are that the appellant violated a condition of his treatment in lieu of conviction;

more importantly, that violation was for possession of drugs, the prior possession of which drug led to appellant's initial arrest. The section to which appellant refers pertaining to relapses is R.C. 2951.041(E) which states that persons released from hospitalization may be rehospitalized at any time the court feels it becomes necessary while these persons are still subject to the ordered term of rehabilitation. This section not so much contemplates giving a person in treatment a second chance, but instead gives the court power to rehospitalize a person when it thinks it is necessary. In the case sub judice, the court decided not to rehospitalize appellant, but decided to sentence him to a jail term instead. The trial court's decision was bolstered by the fact that before appellant was admitted into the treatment program. A counselor who evaluated him determined that while treatment might benefit appellant, he felt that appellant was looking for an easy way out. The trial court could have determined that appellant was not serious about rehabilitation, and, thus, that it was not benefiting him. Thus, the court removed appellant from the treatment program. This court finds no "abuse of discretion." For the above stated reasons, appellant's third assignment of error is overruled.

Appellant's final assignment of error asserts that the court below erred in denying appellant credit for tie served as an in-care patient at Marietta Memorial Hospital. The statute pertaining to this situation is R.C. 2967.191, which states the following:

> "The adult parole authority *shall reduce* the minimum and maximum sentence or *the definite sentence of a prisoner by the total number of days that the prisoner was confined for any reason arising out of the offense for which he was convicted and sentenced,* including confinement in lieu of bail while

awaiting trial, confinement for examination to determine his competence to stand trial or sanity, confinement in a community based correctional facility and program or district community based correctional facility and program, and confinement while awaiting transportation to the place where he is to serve his sentence." (emphasis added)

Appellant argues that the language of the statute mandates that the time spent in Marietta Memorial Hospital be subtracted from the sentence imposed because it falls under "confined for any reason." This court is not clear as to what appellant is suggesting. Either he is contending that the 30 days spent in the hospital should be subtracted from the one year suspended sentence, or that the time spent in the hospital should be subtracted from the six month sentence at the Washington County jail. Under either circumstance, appellant's assignment of error is not well taken.

If appellant is arguing the latter, the statute to which he directs this court is inapplicable. R.C. 2967.191 only applies to state operated penal institutions because the Adult Parole Authority can operate only in state institutions, not county jails. If, alternatively, appellant is asserting that the 30 days be subtracted from the one year suspended sentence at Orient, then the assignment of error must be dismissed for want of jurisdiction because the case is not ripe. Since the sentence was suspended, appellant is not in custody, hence, the Adult Parole Authority can take no action. As a result, there is no case or controversy on which to base this assignment of error. Therefore, appellant's final assignment of error is overruled.

For the aforementioned reasons, the lower court's judgment is affirmed.

It is ordered that appellee recover of appellant costs

herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of filing of this Entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

JUDGMENT AFFIRMED

_____

Judge

Abele, P.J., Concurs

Grey, J., Dissents with attached opinion

NOTICE TO COUNSEL

Pursuant to Local Rule No. 9, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

State v. Thomas, Nos. 88 CA 22 & 29, Washington County

GREY, J. DISSENTING:

I respectfully dissent.

R.C. 2933.52(A) says, "No person shall do any of the following: (1) Intercept... any wire or oral communication:" In this case, Huff intercepted a telephone conversation.

R.C. 2933.62(A) says:

> "(A) No part of the contents, *and no evidence derived from the contents,* of any intercepted wire or oral communication shall be received in evidence in any trial, hearing, or other proceedings in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of this state or of a political subdivision of this state, of the disclosure of that information is in violation of section 2933.51 to 2933.66 of the Revised Code." (Emphasis supplied)

The evidence derived from the contents of this intercept by Huff, was used by Spencer, the probation officer, to arrest Thomas. As far as I am concerned there is no ambiguity in what the statute means. There is no ambiguity in the facts in this case - an intercepted communication was used as evidence in this case. This unquestionably is illegal and inadmissible.

The majority opinion gives a thoughtful analysis, but there is a fatal flaw in that analysis, I believe, which is exemplified at p. 10-11 of the majority opinion, thus:

"We, therefore, believe that where both purposes of

the wiretap law have been satisfied i.e. implementation of the constitutional exclusionary rule and protection of the right to privacy — have been satisfied, evidence discovered as fruits of an illegal wiretap need not be suppressed."

The exclusionary rule and the right of privacy are both treated as ends in the majority opinion. In my opinion, the right of privacy is the end, and the exclusionary rule is only a means to achieve Nos. 88 CA 22 & 29, Washington Co., Grey concurring that end, but also *the* only means to achieve that end. If one does not apply the exclusionary sanction in a proper case, the right of privacy is unenforceable.

In this case "evidence derived from the contents of an intercepted wire communication" was used in a court proceeding. This is a violation of R.C. 2933.62(A). What happened here is just exactly what the legislature wanted to prevent. If we will not enforce the laws guaranteeing our right to privacy, we will not have a right to privacy.

Thus, I dissent.

Appendix C

**IN THE COURT OF COMMON PLEAS,
WASHINGTON COUNTY, OHIO**

FILED
CLERK OF COURTS
WASHINGTON
COUNTY, OHIO

STATE OF OHIO
Plaintiff,
vs
RICHARD THOMAS
Defendant.

Case No. 86 CR 12
DECISION ON
MOTION
TO SUPPRESS

This matter came on for hearing on Defendant's MOTION TO SUPPRESS. The unsigned original thereof was filed on December 31, 1987, and the signed copy on January 5 1988.

On February 20, 1987, Judge Safranek filed both a JOURNAL ENTRY, and a CLARIFICATION OF JUDGMENT ENTRY, the net result of which was to grant Defendant's MOTION FOR TREATMENT IN LIEU OF CONVICTION. Among the terms and conditions upon which the proceedings were stayed for three years, was the following:

> 5. That the defendant is to obey the general terms and conditions of probation as journalized in Volume 99, Page 184 of the records of this court, as though he were on probation. (Emphasis added)

There has been no serious challenge of the court's authority to make such an order.

As a result of that order, imposed on November 7, 1986, the Defendant on that same date signed a CONDITIONS OF PROBATION which contained this term, '(6)

You shall follow the probation officers written instructions which you acknowledged by your signature.' This language may be somewhat misleading since it seems to refer to written instructions that are going to be issued and signed at some later time. In any event the Defendant did on December 10, 1986, acknowledge, by his signature, an INTER-OFFICE COMMUNICATION containing the following:

> Probationer, Richard G. Thomas, is not to associate, communicate, contact, or harass in any way Kristi L. Offerman and/or Phillip E. Huff.

On July 20, 1987, the probation office filed a MOTION & COMPLAINT for violation of the Defendant's stay. The two violations alleged were condition '(6)' and the instruction of December 10, 1986, by association 'with Kristi L. Offerman on or about 7-17-87' and condition '(8)' by possessing marijuana 'on or about 7/17/87.' On August 3, 1987, the probation officer filed another MOTION & COMPLAINT alleging a violation of Condition No, 6 etc., by associating with Kristi L. Offerman 'on or about 7/30/87.'

Chief Justice Moyer assigned Judge Walter E. Hallock Jr. to the case on August 31, 1987, said assignment being filed herein on September 4, 1987. At the first hearing, on October 9, 1987, the court found that there probable cause to believe the conditions had been violated. Final hearing was scheduled for November 24, 1987. William J. Abraham was substituted as defense counsel by ENTRY filed November 16, 1987. As a result of Attorney Abraham's MOTION for a continuance filed at the same time, the notice of January 11, 1988, set the final hearing for February 19, 1988. Attorney Abraham then filed the above referenced MOTION TO SUPPRESS, which was heard on January 8, 1988, and the ENTRY thereon was

filed January 22, 1988. Briefs were filed by the Defendant on January 22, 1988 and by the State on February 3, 1988.

The court will attempt to review the issues in the same order in which they were raised in the memorandum and briefs. The court does not believe that the instruction directing the Defendant to stay away from Offerman and Huff was inappropriate. Considering the history of the parties, it appears that such an instruction was as necessary to controlling an 'as though he were on probation' Defendant, as it would have been for a Defendant who was actually on probation. Defendant did not complain to the court about the instruction. The court does not find it' to be unduly restrictive of Defendant's liberty or incompatible with his freedom of conscience, under the circumstances.

The court finds no relevance in the matter of the informants veracity. The informant supplied the probation officer with a tip. This tip resulted in the probation officer being at a time and place which permitted him to see an alleged violation of a condition of probation. The officer's observations, not the tip, constituted the entire probable cause. The third issue raised by Defendant has to do with Ohio's wiretap law and will be discussed later. This is also the principle issue in Defendant's SUPPLEMENTAL BRIEF.

The State in its BRIEF argues in item 'I' that statute and practicality, if not necessity, mandate that that the court delegate to probation officers the authority to impose special conditions which the probation officer feels are necessary to effectuate the goals of probation. This sounds very proper and practical on its face, but can it stand scrutiny? The court finds no such delegation authorized by Section 2951.05 ORC, which only purports to determine who shall be responsible for control and supervision of probationers. On the other hand Section

2951.02 (C) ORC not only dictates the minimum conditions of probation but also recites the following:

> ...the court may impose additional requirements on the offender.... Compliance with the additional requirements shall also be a condition of the offender's probation....

This would appear to limit imposition and modification of conditions of probation to the courts. Actually '(6)' of the court's CONDITIONS doesn't even purport to delegate authority to the probation officer with regard to conditions of probation, but deals with the officer's written instructions. In the absence of some specific authority to the contrary, this Judge would consider a written instruction to be a direction to the probationer with regard to such things as when and where he is required to report, how he is to pay court costs. '(10)', what limitations may be placed on approval or permission '(5)', '(7)' and '(9)'. The form concludes with the statement in caps' In UNDERSTAND THAT THE COURT MAY CHANGE THE CONDITIONS OF PROBATION...'. The MOTION & COMPLAINT of July 20, 1987, make it clear that we are dealing with ' a special condition of probation' not a written instruction. The court is in agreement with the State as to item 'II' for the reasons discussed above. Item 'III' is the wiretap issue.

In light of the evidence, law, and arguments presented, the court will treat Defendant's MOTION TO SUPPRESS, as it relates to condition '(6)', as a motion to dismiss and will grant such motion, as to both the July 20, 1987, and August 3, 1987, MOTION & COMPLAINT. The court does not recall any evidence being presented as to the later complaint, but found no entry dismissing it.

The other violation alleged in the July 20, 1987, MOTION & COMPLAINT concerns item '(8)' of the CONDI-

TIONS OF PROBATION which reads as follow:

> You shall not possess, use, sell, distribute, or have under your control any narcotic drugs, barbiturates, hallucinogens, paregoric, or extracts containing them in any form or instruments for administering them except on prescription of a licensed physician.

The State alleges,and presented proof, that Defendant did in fact possess a small amount of Marijuana on July 17, 1987, This raises the wiretap issue.

The court finds that an extension phone is an 'interception device' unless it fits into a n exception. There seems to be no question that Mr. Huff actually used the phone, but the court suggests that a 'user' by definition is one authorized by the subscriber, or the common carrier, to use such extension phone. The court finds that the State fares no better on its argument as to purpose. While no specific intention was proven by Defendant it appears that the 'gist of the offense is a [prohibition] against conduct of a certain nature, regardless of what the offender intends.' One is presumed to know the law!

This law occupies about eleven pages in Pages Ohio Revised Code. Three pages concern primarily definitions and exceptions. Seven pages deal almost exclusively with matters related directly to the procedures for obtaining and using interception warrants and maintaining the results, thereof. Only a little over a page concerns other things, such as motions to supress evidence, appeals, wiretap training school, and civil and criminal actions. Under Section 2933.63 ORC, three of the four basis for suppression concern warrant matters. It appears that the subject fact situation was given minimal consideration, if any, by the Legislature. The language of the statute appears to be sufficiently broad to apply it to this type of situation, even if the legislature never intended such a result.

This court suggests a nightmare scenario. A man calls the Sheriff's office and says 'I picked up an extension phone at John Smith's house and heard him make arrangements to kill Jim Jones at Devol's Dam at 8:00 PM tonight.' The deputy responds, 'Gee, I wish you hadn't told me all that, under the wiretap law if we go out and see the murder, John Smith will have our testimony suppressed. 'The deputy goes on, 'I think we better wait and if the murder is reported in the normal way we will hope that our investigation can turn up independent evidence connecting John with the murder.' This mind boggling result would appear to be such a restriction on the administrative branch of government, by the legislative branch in its fervor to protect the right of privacy, as to constitute an unconstitutional violation of the separation of powers.

If Defendant's premise is correct, what would prevent legislature from making it unreasonable' to search any residence and to define a residence as being any structure or container in which one or more person is found.

Quite apart from any philisophical problem, the court, after reviewing the cases cited by Defendant, does not believe that the application of the exclusionary provisions is warranted.

The court does not agree with the states attempt to distinguish the *Horn* case, since the court did find purpose in the instant case. The court might also observe that while one may inadvertently pick up a phone, it is not likely that a person will hear much unless he or she continues to listen after becoming aware that the lines are in use. In that situation there would be actual purpose. In the instant case Phillip Huff did not testify. Defendant wants the court to apply Horn to evidence derived from a tip, that resulted from a surreptitious interception, in which the government, as represented by the probation officer, was guilty of no misconduct whatsoever.

While this court generally concurs with Judge Boyer's decision in the *Horn* case. it will not extend it beyond that limited fact situation. The *Liddy* case indicates that the exclusion is not generally applicable to cases where the interceptions are by private individuals. *In re Proceedings to enforce Grand Jury Subpoenas,* as Defendant points out, likened the wiretap exclusionary rule rationale to that of the fourth amendment exclusionary rule, the purpose of which is to deter governmental misconduct. *Smith,* also involved governmental misconduct, as Defendant correctly quoted the appellate courts preliminary statement. However, that court went on to find that th first wiretap was valid and affirmed the convictions. The *Bagley* case does stand for strict construction of the wiretap law, but that case dealt with a situation in which the government's affidavit for the wiretap warrant was insufficient.

The court finds that none of these cases support the overbearing use of the statutory exclusion requested by Defendant.

MOTION TO SUPPRESS is denied.

The court will anticipate an additional objection by Defendant. Since condition '(6)' was invalid the arrest was invalid! The court does not believe this to be so. Having found that there was probable cause to believe that the Defendant had violated a condition of probation, he had authority to arrest him and search him. The court finds this analogous to the situation where a Defendant is found not guilty of disorderly conduct but guilty of a resisting arrest arising out of the disorderly charge.

Walter E. Hallock, Jr., Judge

DATED: February 11, 1988

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Appendix D

§2933.51 Definitions.

As used in sections 2501.20 and 2933.51 to 2933.66 of the Revised Code:

(A) "Wire communication" means any communication that is made in whole or in apart through the use of facilities for the transmission of communications by the aid of wires or similar methods of connecting the point of origin of the communication and the point of reception of the communication.

(B) "Oral communication" means any human speech that is used to communicate by one person to another person.

(C) "Intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any interception device.

(D) "Interception device" means any electronic, mechanical, or other device or apparatus that can be used to intercept a wire or oral communication. "Interception device" does not mean any of the following:

(I) Any telephone or telegraph instrument, equipment, or facility, or any of its components, if the instrument, equipment, facility, or component is any of the following:

(a) Furnished to the subscriber or user by a communications common carrier in the ordinary course of its business:

(b) Being used by a subscriber or used in connection with the service of a communications common carrier in the ordinary course of that carrier's business and being used in a manner for which such device or apparatus was designed:

(c) Being used by a communications common carrier in the ordinary course of its business and is used by the subscriber or used in the ordinary course of its business, or by an investigative officer in the ordinary course of his

duties.

(2) A hearing aid or similar device being used to correct subnormal hearing to not better than normal.

(E) "Investigative officer" means any of the following:

(I) Any officer of the state or a political subdivision of the state, who is empowered by law to conduct investigations or to make arrests for any designated offense:

(2) Any person described in divisions (K)(1) and (2) of section 2901.01 of the Revised Code:

(3) Any attorney authorized by law to prosecute or participate in the prosecution of any designated offense:

(4) Any secret service officer appointed pursuant to section 309.07 of the Revised Code.

(F) "Interception warrant" means a court order that authorizes the interception of wire or oral communications and that is issued pursuant to sections 2933.53 to 2933.56 of the Revised Code.

(G) "Contents." when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to the communication or concerning the existence, substance, purport, or meaning of the communication.

(H) "Communications common carrier" means any person who is engaged as a common carrier for hire in intrastate, or foreign communications by wire, radio, or radio transmission of energy, "Communications common carrier" does not include, to the extent that the person is engaged in radio broadcasting, any person engaged in radio broadcasting.

(I) Any felony violation of section 2903.01. 2903.02. 2903.11 2905.01. 2905.02.2905.11. 2905.22. 2907.21. 2907.22. 2909.02. 2909.03. 2909.04. 2911.01. 2911.02. 2911.11. 2911.12. 2915.02. 2915.03. 2915.06. 2617.01. 2917.02. 2921.02. 2921.03. 2921.04. 2921.32. 2921.34. 2923.20. 2923.32. or 2925.03. or any felony violation of section 2905.04 of the Revised Code:

(2) Complicity in the commission of any felony violation of any section listed in division (1)(1) of this section:

(3) Any attempt to commit, or conspiracy in the commission of, any felony violation of any section listed in division (1)(1) of this section, if the attempt or conspiracy is punishable by a term of imprisonment of more than one year.

(J) "Aggrieved person" means a person who was a party to any intercepted wire or oral communication, or a person against whom the interception of the communication was directed.

(K) "Person" means any person, as defined in section 1.59 of the Revised Code, and any governmental officer, employee, or entity.

(L) "Designated appellate court judge" means the judge of the court of appeals serving the county in which an interception is to take place who is designated pursuant to division (A) of section 2501.20 of the Revised Code by the presiding judge of that court of appeals to receive, consider, and act upon applications for interception warrants and applications for oral approval for an interception, or , if that designated judge is unavailable, the judge of that court of appeals who is designated pursuant to division (B) of section 2501.20 of the Revised Code to substitute for the unavailable designated judge.

(M) "Special need" means a showing that a licensed physician, licensed practicing psychologist, attorney, practicing clergyman, journalist, or either spouse is personally engaging in continuing criminal activity, was engaged in continuing criminal activity over a period of time, or is committing, has committed, or is about to commit, a designated offense, or a showing that specified public facilities are being regularly used by someone who is personally engaging in continuing criminal activity, was engaged in continuing criminal activity over a period of time, or is committing, has committed, or is about to

commit, a designated offense.

(N) "Journalist" means a person engaged in, connected with, or employed by, any news media, including any newspaper, magazine, press association, news agency, or wire service, any radio or television station, or any other similar media, for the purpose of gathering, processing, transmitting, compiling, editing, or disseminating news for the general public.

(O) "Designated attorney" means the attorney who is designated pursuant to division (C) of section 2501.20 of the Revised Code by the presiding judge of the court of appeals to appear in in-camera adversary hearings for the purpose of opposing applications for warrants to intercept wire or oral communications within that court of appeals district or, if that designated attorney is unavailable, any attorney who is designated pursuant to division (D) of section 2501.20 of the Revised Code to substitute for the unavailable designated attorney.

HISTORY: 141 v S 222. Eff 3-25-87.

§ 2933.52 Interception of wire or oral communications.

(A) No person purposely shall do any of the following:

(1) Intercept, attempt to intercept, or procure any other person to intercept or attempt to intercept any wire or oral communication;

(2) Use, attempt to use, or procure any other person to use or attempt to use any interception device to intercept any wire or oral communication, if either of the following apply:

(a) The interception device is affixed to, or otherwise transmits a signal through, a wire, cable, satellite, microwave, or other similar method of connection used in wire communications:

(b) The interception device transmits communications by radio, or interferes with the transmission of communications by radio.

(3) Disclose, or attempt to disclose, to any other person

the contents, or any evidence derived from the contents, of any wire or oral communication, knowing or having reason to know that the contents, or evidence derived from the contents, was obtained through the interception of the wire or oral communication in violation of sections 2933.51 to 2933.66 of the Revised Code.

(B) This section does not apply to any of the following:

(1) The interception, disclosure, or use of the contents, or any evidence derived from the contents, of any oral or wire communication that is obtained through the use of an interception warrant issued pursuant to sections 2933.53 to 2933.56 of the Revised Code, that is obtained pursuant to an oral approval for an interception granted pursuant to section 2933.57 of the Revised Code, or that is obtained pursuant to any order or interception that is issued or made in accordance with section 802 of the "Omnibus Crime Control and Safe Streets Act of 1968," 82 Stat. 237, 254, 18 U.S.C. 2510 to 2520 (1968), as amended, or the "Foreign Intelligence Surveillance Act," 92 Stat. 1783, 50 U.S.C. 1801.11 (1978), as amended:

(2) An operator of a switchboard, or an officer or agent of a communications common carrier, whose facilities are used in the transmission of a wire communication to intercept, disclose, or use that communication in the normal course of employment while engaged in any activity that is necessary to the rendition of service or the protection of the rights or property of the communications common carrier, provided that the communications common carrier shall not utilize service observing or random monitoring except for mechanical or service quality control checks;

(3) A law enforcement officer who intercepts a wire or oral communication, if th officer is a party to the communication or if one of the parties to the communication has given prior consent to the interception by the officer;

(4) A person who is not a law enforcement officer and

who intercepts a wire or oral communication, if the person is a party to the communication or if one of the parties to the communication has given the person prior consent to the interception, and if the communication is not intercepted for the purpose of committing any criminal offense or tortious act in violation of the laws or Constitution of the United States or this state or for the purpose of committing any other injurious act;.

(5) An officer, employee, or agent of any communications common carrier providing information, facilities, or technical assistance to an investigative officer who is authorized to intercept a wire or oral communication pursuant to sections 2933.51 to 2933.66 of the Revised Code:

(6) A pen register, which, as used in this section, means a device that records or decodes electronic impulses that identify the numbers dialed, pulsed, or otherwise transmitted on telephone lines to which the device is attached;

(7) A trap, which, as used in this section, means any device or apparatus that connects to any telephone or telegraph instrument, equipment or facility and determines the origin of a wore communication to a telephone or telegraph instrument, equipment or facility, but does not intercept the contents of any wire communication;

(8) Any police, fire, or emergency communications system to intercept wire communications coming into and going out of the communications system of a police department, fire department, or emergency center, if both of the following apply:

(a) The telephone, instrument, equipment, or facility is limited to the exclusive use of the communication system for administrative purposes;

(b) At least one telephone, instrument, equipment, or facility that is not subject to interception is made available for public use at each police department, fire department, or emergency center.

(C) Whoever violates this section is guilty of

interception of wire or oral communications, a felony of the third degree.

*HISTORY: 142 v H 231. Eff 10-5-87.

§ 2933.32 Conditions for receiving results in evidence.

(A) No part of the contents, and no evidence derived from the contents, of any intercepted wire or oral communication shall be received in evidence in any trial, hearing, or other proceedings in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of this state or of a political subdivision of this state, if the disclosure of that information is in violation of sections 2933.51 to 2933.66 of the Revised Code.

(B) The contents, or any evidence derived from the contents, of any wire or oral communication intercepted pursuant to sections 2933.51 to 2933.66 of the Revised Code shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding held under the authority of this state, other than a proceeding or session of the grand jury, unless each party has been furnished not less than ten days before the trial, hearing, or proceeding, with a copy of the interception warrant and the application under which the interception warrant was authorized. The ten-day period may be waived by the judge, if the finds that it was not practicable to furnish the party with the above information within ten days before the trial, hearing, or proceeding or that the waiver is in the interest of justice, and that the party will not be prejudiced by the delay in receiving the information.

HISTORY: 141 v S 222. Eff 3-25-87.

§ 2933.63 Motion to suppress evidence; appeals.

(A) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of this state or of any political subdivision of this state, other than a grand jury, may request the court by motion to suppress

the contents, or any evidence derived from the contents, of any intercepted wire or oral communication for any of the following reasons:

(1) The communication was unlawfully intercepted;

(2) The interception warrant under which the communication was intercepted in insufficient on its face:

(3) The interception was not made in conformity with the interception warrant:

(4) The communications are of a privileged character and a special need for their interception is not shown or is inadequate as shown.

(B) Any motion filed pursuant to division (A) of this section shall be made before the trail, hearing, or proceeding at which the contents, or evidence derived from the contents, is to be used , unless there was no opportunity to make the motion or the aggrieved person was not aware of the intercepted communications or the grounds of the motion. Upon the filing of the motion by the aggrieved person, the judge may in his discretion make available to the aggrieved person or his counsel for inspection any portions of the intercepted communication or evidence derived from the interception as the judge determines to be in the interests of justice. If the judge grants the motion to suppress evidence pursuant to this section, the contents or evidence derived from the contents of the intercepted wire or oral communications shall be treated as having been obtained in violation of the law, and the contents and evidence derived from the contents shall not be received in evidence in any trial, hearing, or proceeding.

(C) In addition to any other right to appeal, the state shall have an appeal as of right from any order suppressing the contents, or any evidence derived from the contents, of any wire or oral communication that was intercepted pursuant to an interception warrant, or the denial of an application for an interception warrant, if the

state's representative certifies to the judge or other official granting the motion or denying the application that the appeal is not taken for purposes of delay and will be diligently prosecuted.

In addition to any other right to appeal, the designated attorney shall have the right to appeal the granting of an application for an interception warrant, if the designated attorney certifies to the judge granting the application that the appeal is not taken for the purpose of delay and that the appeal will be diligently prosecuted.

HISTORY: 141 v S 222. Eff 3-25-87.

[§ 2951.04.1] §2951.041 [Treatment in lieu of conviction.]

(A) If the court has reason to believe that an offender charged with a felony or misdemeanor is a drug dependent person or is in danger of becoming a drug dependent person, the court shall, prior to the entry of a plea, accept that offender's request for treatment in lieu of conviction. If the offender requests treatment in lieu of conviction, the court shall stay all criminal proceedings pending the outcome of the hearing to determine whether the offender is a person eligible for treatment in lieu of conviction. At the conclusion of the hearing, the court shall enter its findings and accept the offender's plea.

(B) The offender is eligible for treatment in lieu of conviction if the court finds that:

(1) The offender's drug dependence or danger of drug dependence was a factor leading to the criminal activity with which he is charged,and rehabilitation through treatment would substantially reduce the likelihood of additional criminal activity;

(2) The offender has been accepted into an appropriate drug treatment facility or program. An appropriate facility or program for rehabilitation or treatment includes a special facility established by the director of mental health pursuant to section 5122.49 of the Revised

Code, a program licensed by the director pursuant to section 5122.50 of the Revised Code, a program certified by the director pursuant to division (C) of section 5122.51 of the Revised Code, a public or private hospital, the veterans administration or other agency of the federal government, or private care or treatment rendered by a physician or a psychologist licensed in the state;

(3) If the offender were convicted he would be eligible for probation under section 2951.02 of the Revised Code, except that a finding of any of the criteria listed in divisions (D) and (F) of that section shall cause the offender to be conclusively ineligible for treatment in lieu of conviction;

(4) The offender is not a "repeat offender" or "dangerous offender" as defined in section 2929.01 of the Revised Code;

(5) The offender is not charged with any offense defined in section 2925.02, 2925.03, or 2925.21 of the Revised Code.

Upon such a finding and where the offender enters a plea of guilty or no contest, the court may stay all criminal proceedings and order the offender to a period of rehabilitation. Where a plea of not guilty is entered, a trial shall precede further consideration of the offender's request for treatment in lieu of conviction.

(C) The offender and the prosecuting attorney shall be afforded the opportunity to present evidence to establish eligibility for treatment in lieu of conviction, and the prosecutor may make a recommendation to the court concerning whether or not the offender should receive treatment in lieu of conviction. Upon the request of the offender and to aid the offender in establishing his eligibility for treatment in lieu of conviction, the court may refer the offender for medical and psychiatric examination to the department of mental health or to a state facility designated by the department, to a

psychiatric clinic approved by the department, or to a program or facility described in division (B)(2) of this section. However, the psychiatric portion of an examination pursuant to a referral under this division shall be performed only by a court appointed individual who has not previously treated the offender or a member of his immediate family.

(D) An offender found to be eligible for treatment in lieu of conviction and ordered to a period of rehabilitation shall be placed under the control and supervision of the county probation department or the adult parole authority as provided in Chapter 2951. of the Revised Code as if he were on probation. The court shall order a period of rehabilitation to continue for such period as the judge or magistrate determines which may be extended but the total period shall not exceed three years. The period of rehabilitation shall be conditioned upon the offender's voluntary entrance into an appropriate treatment facility or program, faithful submission to prescribed treatment, and upon such other conditions as the court orders.

(E) Treatment of a person ordered to a period of rehabilitation under this section may include hospitalization under close supervision or otherwise, release on an out-patient status under supervision, and such other treatment or after-care as the appropriate treatment facility or program considers necessary or desirable to rehabilitate such person. Persons

released from hospitalization or treatment but still subject to the ordered term of rehabilitation may be rehospitalized or returned to treatment at any time it becomes necessary for their treatment and rehabilitation.

(F) If the treating facility or program reports to the probation officer that the offender has successfully completed treatment and is rehabilitated, the court may dismiss the charges pending against the offender. If the

treating facility or program reports that the offender has successfully completed treatment and is rehabilitated or has obtained maximum benefits from the treatment program, and that the offender completes the period of rehabilitation and other conditions ordered by the court, the court shall dismiss the charges pending against the offender. If the treating facility or program reports that the offender has failed treatment, or if the offender dose not satisfactorily complete the period of rehabilitation or the other conditions ordered by the court, the court may take such actions as it considers appropriate. Upon violation of the conditions of the period of rehabilitation, the court may enter an adjudication of guilt and proceed as otherwise provided. If at any time after treatment has commenced, th treating facility or program reports that the offender fails to submit to or follow the prescribed treatment, the offender shall be arrested as provided in section 2951.08 of the Revised Code and removed from the treatment program or facility. Such failure and removal shall be considered by the court as a violation of the conditions of the period of rehabilitation and dealt with according to law as in cases of probation violation. At any time and for any appropriate reason, the offender, his probation officer, the authority or department that has the duty to control and supervises the offender as provided for in section 2951.05 of the Revised Code, or the treating facility or program may petition the court to reconsider, suspend, or modify its order for treatment concerning that person.

(G) The treating facility or program shall report to the authority or department who has the duty to control and supervise the offender as provided for in section 2951.05 of the Revised Code, at any periodic reporting period the court requires and whenever the offender is changed from an impatient to an outpatient, is transferred to another treatment facility or program, fails to submit to or follow

the prescribed treatment, becomes a discipline problem, is rehabilitated, or obtains the maximum benefit of treatment.

(H) If, on the offender's motion, the court finds that the offender has successfully completed the period of rehabilitation ordered by the court, is rehabilitated, is no longer drug dependent or in danger of becoming drug dependent, and has completed all other conditions, the court shall dismiss the proceeding against him. Successful completion of a period of rehabilitation under this section shall be without adjudication of guilt and is not a criminal conviction for purposes of disqualifications or disabilities imposed by law and upon conviction of a crime, and the court may order the expungement of records in the manner provided in sections 2953.31 to 2953.36 of the Revised Code.

(I) An order denying treatment in lieu of conviction under this section shall not be construed to prevent conditional probation under section 2951.04 of the Revised Code.

(J) Any person ordered to treatment by the terms of this section shall be liable for expenses incurred during the course of treatment- and if he is treated in a benevolent institution under the jurisdiction of the department of mental health , he is subject to the provisions of Chapter 5121. of the Revised Code.

(K) An offender charged with a drug abuse offense, other than a minor misdemeanor involving marijuana and otherwise eligible for treatment in lieu of conviction may request and may be ordered to a period of rehabilitation even though the findings required by divisions (B)(1)and(2) of this section are not made. An order to rehabilitation under this division shall be subject to such conditions as the court requires but shall not be conditioned upon entry into an appropriate treatment program or facility.

HISTORY: 136 v H 300 (Eff 7-1-76); 138 v H 900. Eff 7-1-80.

The effective date of HB 900 is set by section 3 of the act.

§ 2510. Definitions

As used in this chapter [18 USCS §§ 2510 et seq.]-

(1) "wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications;

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation;

(3) "State" means any State of the United States, the District of columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

(4) "intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.

(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire or oral communication other than—

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or (ii) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) a hearing aid or similar device being used to correct

subnormal hearing to not better than normal;

(6) "person" means any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation;

(7) "Investigative or law enforcement officer" means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter [18 USCS §§ 2510 et seq.], and any attorney authorized by law to prosecute or participate in the prosecution of such offenses;

(8) "contents," when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication;

(9) "Judge of competent jurisdiction" means—

(a) a judge of a United States district court or a United States court of appeals; and

(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire or oral communications;

(10) "communication common carrier" shall have the same meaning which is given the term "common carrier" by section 153(h) of title 47 of the United States Code [**47 USCS § 153(h)**]; and

(11) "aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

(Added June 19, 1968, P. L. 90-351, Title III, § 802, 82 Stat. 212.)

§ 2510. Definitions

[Introductory matter unchanged]

(1) "wire communication" means any aural transfer

made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception (including the use of such connection in a switching station) furnished or operated by any person engaged in providing or operating such facilities for the transmission of interstate or foreign communications or communications affecting interstate or foreign commerce and such term includes any electronic storage of such communication, but such term does not include the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the unit;

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication;

(3) [Unchanged]

(4) "intercept" means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.

(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire, oral, or electronic communication other than—

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a provider of wire electronic communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business or furnished by such subscriber or user for connection to the facilities of such service and used in the ordinary course of its business; or (ii) being used by a provider of wire or electronic communication service in the ordinary course of its business, or by an in-

vestigative or law enforcement officer in the ordinary course of his duties;

(b) [Unchanged]

(6), (7) [Unchanged]

(8) "contents," when used with respect to any wire, oral, or electronic communication, includes any information concerning the substance, purport, or meaning of that communication;

(9) [Introductory matter unchanged]

(a) [Unchanged]

(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire, oral, or electronic communications;

(10) "communication common carrier" shall have the same meaning which is given the term "common carrier" by section 153(h) of title 47 of the United States Code;

(11) "aggrieved person" means a person who was a party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed;

(12) "electronic communication" means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce, but does not include—

(A) the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit;

(B) any wire or oral communication;

(C) any communication made through a tone-only paging device; or

(D) any communication from a tracking device (as defined in section 3117 of this title);

(13) "user" means any person or entity who—

(A) uses an electronic communication service; and

(B) is duly authorized by the provider of such service to engage in such use;

(14) "electronic communications system" means any wire, radio, electromagnetic, photooptical or photoelectronic facilities for the transmission of electronic communications, and any computer facilities or related electronic equipment for the electronic storage of such communications;

(15) "electronic communication service" means any service which provides to users thereof the ability to send or receive wire or electronic communications;

(16) "readily accessible to the general public" means, with respect to a radio communication, that such communication is not—

(A) scrambled or encrypted;

(B) transmitted using modulation techniques whose essential parameters have been withheld from the public with the intention of preserving the privacy of such communication;

(C) carried on a subcarrier or other signal subsidiary to a radio transmission;

(D) transmitted over a communication system provided by a common carrier, unless the communication is a tone only paging system communication; or

(E) transmitted on frequencies allocated under part 25, subpart D, e, or F of part 74 94 of the Rules of the Federal Communications Commission, unless, in the case of a communication transmitted on a frequency allocated under part 74 that is not exclusively allocated to broadcast auxiliary services, the communication is a two-way voice communication by radio;

(17) "electronic storage" means—

(A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and

(B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication; and

(18) "aural transfer" means a transfer containing the human voice at any point between and including the point of origin and the point of reception.

(As amended Oct. 21, 1986, P. L. 99-508, Title I, § 101(a), (c)(I)(A), (4) 100 Stat. 1848, 1851.)

§ 2511. Interception and disclosure of wire or oral communications prohibited

(1) Except as otherwise specifically provided in this chapter [18 USCS §§ 2510 et seq.] any person who—

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(2)(a)(i) It shall not be unlawful under this chapter [18 USCS §§ 2510 et seq.] for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication: Provided, That said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(ii) Notwithstanding any other law, communication common carriers, their officers, employees, and agents, landlords, custodians, or other persons, are authorized to provide information, facilities, or technical assistance to persons authorized by law to intercept wire or oral communications or to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978 [50 USCS § 1801], if the common car-

rier, its officers, employees, or agents, landlord, custodian, or other specified person, has been provided with—

(A) a court order directing such assistance signed by the authorizing judge, or

(B) a certification in writing by a person specified in section 2518(7) of this title [18 USCS § 2518(7)] or the Attorney General of the United States That no warrant or court order is required by law, that all statutory requirements have been met, and that the specified assistance is required, setting forth the period of time during which the provision of the information, facilities, or technical assistance is authorized and specifying the information, facilities, or technical assistance required. No communication common carrier, officer, employee, or agent thereof, or landlord, custodian, or other specified person shall disclose the existence of any interception or surveillance or the device used to accomplish the interception or surveillance with respect to which the person has been furnished an order or certification under this subparagraph, except as may otherwise be required by legal process and then only after prior notification to the Attorney General or to the principal prosecuting attorney of a State or any political subdivision of a State, as may be appropriate. Any violation of this subparagraph by a communication common carrier or an officer, employee, or agent thereof, shall render the carrier liable for the civil damages provided for in section 2520 [18 USCS § 2520]. No cause of action shall lie in any court against any communication common carrier, its officers, employees, or agents, landlord, custodian, or other specified person for providing information, facilities, or assistance in accordance with the terms of an order or certification under this subparagraph.

(b) It shall not be unlawful under this chapter [18 USCS §§ 2510 et seq.] for an officer, employee, or agent of

the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(c) It shall not be unlawful under this chapter [18 USCS §§ 2510 et seq.] for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter [18 USCS §§ 2510 et seq.] for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

(e) Notwithstanding any other provision of this title [18 USCS §§ 1 et seq.] or section 605 or 606 of the Communications Act of 1934 [47 USCS § 605 OR 606], it shall not be unlawful for an officer, employee, or agent of the United States in the normal course of his official duty to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978 [50 USCS § 1801', as authorized by that Act [50 USCS §§ 1801 et seq.].

(f) Nothing contained in this chapter [18 USCS §§ 2510 et seq.], or section 605 of the Communications Act of 1934 [47 USCS §§ 151 et seq.], shall be deemed to affect the acquisition by the United States Government of foreign in-

telligence information from international or foreign communications by a means other than electronic surveillance as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978 [50 USCS § 1801], and procedures in this chapter [18 USCS §§ 2510 et seq.] and the Foreign Intelligence Surveillance Act of 1978 [50 USCS §§ 1801 et seq.] shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act [50 USCS § 1801], and the interception of domestic wire and oral communications may be conducted.

(3) [Repealed]

(Added June 19, 1968, P. L. 90-351, Title III, § 802, 82 Stat. 213; July 29, 1970, P. L. 91-358, Title II, § 211(a), 84 Stat. 654; Oct. 25, 1978, P. L. 95-511, Title II, § 201(a)-(c), 92 Stat. 1796.)

18 USCS § 2511

§ 2511. Interception and disclosure of wire, oral, or electronic communications prohibited

(I) [Introductory matter unchanged]

(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;

(b) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—

(i)-(v) [Unchanged]

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or

having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

(2)(a)(i) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of a provider of wire or electronic communication service, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the provider of that service, except that a provider of wire communication service to the public shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(ii) Notwithstanding any other law, providers of wire or electronic communication service, their officers, employees, and agents, landlords, custodians, or other persons, are authorized to provide information, facilities, or technical assistance to persons authorized by law to intercept wire, oral, or electronic communications or to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978 if such provider, its officers, employees, or agents, landlord, custodian, or other specified person, has been provided with—

(A),(B) [Unchanged]

setting forth the period of time during which the provision of the information, facilities, or technical assistance is authorized and specifying the information, facilities, or technical assistance required. No provider of wire or electronic communication service, officer, employee, or agent thereof, or landlord, custodian, or other

specified person shall disclose the existence of any interception or surveillance or the device used to accomplish the interception or surveillance with respect to which the has been furnished an order or certification under this subparagraph, except as may otherwise be required by legal process and then only after prior notification to the Attorney General or to the principal prosecuting attorney of a State or any political subdivision of a State, as may be appropriate, Any such disclosure, shall render such person liable for the civil damages provided for in section 2520. No cause of action shall lie in any court against any provider of wire or electronic communication service, its officers, employees, or agents, landlord, custodian, or other specified person for providing information, facilities, or assistance in accordance with the terms of a court order or certification under this chapter.

(b) It shall not be unlawful under this chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire or electronic communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose

of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

(e) Notwithstanding any other provision of this title [18 USCS §§ 1 et seq.] or section 705 or 706 of the Communications Act of 1934 [47 USCS § 605 or 606], it shall not be unlawful for an officer, employee, or agent of the United States in the normal course of his official duty to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978 [50 USCS § 1801], as authorized by that Act [50 USCS §§ 1801 et seq.].

(f) Nothing contained in this chapter [18 USCS §§ 2510 et seq.] or chapter 121, or section 705 of the Communications Act of 1934 [47 USCS § 605], shall be deemed to affect the acquisition by the United States Government of foreign intelligence information from international or foreign communications, or foreign intelligence activities conducted in accordance with otherwise applicable Federal law involving a foreign electronic communications system, utilizing a means other than electronic surveillance as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978 [50 USCS § 1801], and procedures in this chapter [18 USCS §§ 2510 et seq.] and the Foreign Intelligence Surveillance Act of 1978 [50 USCS §§ 1801 et seq.] shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act [50 USCS § 1801], and the interception of domestic wire, oral, or electronic communications may be conducted.

(g) It shall not be unlawful under this chapter or chapter 121 of this title for any person—

(i) to intercept or access an electronic communication made through an electronic communication system that is configured so that such electronic communication is readily accessible to the general public;

(ii) to intercept any radio communication which is transmitted—

(I) by any station for the use of the general public, or that relates to ships, aircraft, vehicles or persons in distress;

(II) by any governmental, law enforcement, civil defense, private land mobile, or public safety communications system, including police and fire, readily accessible to the general public;

(III) by a station operating on an authorized frequency within the bands allocated to the amateur, citizens band, or general mobile radio services; or

(IV) by any marine or aeronautical communications system;

(iii) to engage in any conduct which—

(I) is prohibited by section 633 of the Communications Act of 1934; or

(II) is excepted from the application of section 705(a) of the Communications Act of 1934 by section 705(b) of that Act;

(iv) to intercept any wire or electronic communication the transmission of which is causing harmful interference to any lawfully operating station or consumer electronic equipment, to the extent necessary to identify the source of such interference; or

(v) for other users of the same frequency to intercept any radio communication made through a system that utilizes frequencies monitored by individuals engaged in the provision or the use of such system, if such communication is not scrambled or encrypted.

(h) It shall not be unlawful under this chapter—

(i) to use a pen register or a trap and trace device (as those terms are defined for the purposes of chapter 206 (relating to pen registers and trap and trace devices) of this title); or

(ii) for a provider of electronic communication service to

record the fact that a wire or electronic communication was initiated or completed in order to protect such provider, another provider furnishing service toward the completion of the wire or electronic communication, or a user of that service, from fraudulent, unlawful or abusive use of such service.

(3)(a) Except as provided in paragraph (b) of this subsection, a person or entity providing an electronic communication service to the public shall not intentionally divulge the contents of any communication (other than one to such person or entity, or an agent thereof) while in transmission on that service to any person or entity other than an addressee or intended recipient of such communication or an agent of such addressee or intended recipient.

(b) A person or entity providing electronic communication service to the public may divulge the contents of any such communication—

(i) as otherwise authorized in section 2511(2)(a) or 2517 of this title;

(ii) with the lawful consent of the originator or any addressee or intended recipient of such communication;

(iii) to a person employed or authorized, or whose facilities are used, to forward such communication to its destination; or

(iv) which were inadvertently obtained by the service provider and which appear to pertain to the commission of a crime, if such divulgence is made to a law enforcement agency.

(4)(a) Except as provided in paragraph (b) of this subsection or in subsection (5), whoever violates subsection (1) of this section shall be fined under this title or imprisoned not more than five years, or both.

(b) If the offense is a first offense under paragraph (a) of this subsection and is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain, and the wire or

electronic communication with respect to which the offense under paragraph (a) is a radio communication that is not scrambled or encrypted, then—

(i) if the communication is not the radio portion of a cellular telephone communication, a public land mobile radio service communication or a paging service communication, and the conduct is not that described in subsection (5), the offender shall be fined under this title or imprisoned not more than one year, or both; and

(ii) if the communication is the radio portion of a cellular telephone communication, a public land mobile radio service communication or a paging service communication, the offender shall be fined not more than $500.

(c) Conduct otherwise an offense under this subsection that consists of or relates to the interception of a satellite transmission that is not encrypted or scrambled and that is transmitted—

(i) to a broadcasting station for purposes of retransmission to the general public; or

(ii) as an audio subcarrier intended for redistribution to facilities open to the public, but not including data transmissions or telephone calls,

is not an offense under this subsection unless the conduct is for the purposes of direct or indirect commercial advantage or private financial gain.

(5)(a)(i) If the communication is—

(A) a private satellite video communication that is not scrambled or encrypted and the conduct in violation of this chapter is the private viewing of that communication and is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain; or

(B) a radio communication that is transmitted on frequencies allocated under subpart D of part 74 of the rules of the Federal Communications Commission that is not scrambled or encrypted and the conduct in violation of

this chapter is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain, then the person who engages in such conduct shall be subject to suit by the Federal Government in a court of competent jurisdiction.

(ii) In an action under this subsection—

(A) if the violation of this chapter is a first offense for the person under paragraph (a) of subsection (4) and such person has not been found liable in a civil action under section 2520 of this title, the Federal Government shall be entitled to appropriate injunctive relief; and

(B) if the violation of this chapter is a second or subsequent offense under paragraph (a) of subsection (4) or such person has been found liable in any prior civil action under section 2520, the person shall be subject to a mandatory $500 civil fine.

(b) The court may use any means within its authority to enforce an injunction issued under paragraph (ii)(A), and shall impose a civil fine of not less than $500 for each violation of such an injunction.

(As amended Oct. 30, 1984, P. L. 98-549, § 6(b)(2), (3), 98 Stat. 2804; Oct. 21, 1986, P. L. 99-508, Title I, §§ 101(b), (c)(1),(5),(6).(d),(f)(1), 102, 100 Stat. 1848, 1853.).

§ 2515. Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter [18 USCS §§ 2510 et seq.]. (Added June 19, 1968, P. L. 90-351, Title III, § 802, 82 Stat. 216.)